SUPREME COURT OF THE UNITED STATES

October Term 1925

Nos. 232, 233, 234

ALIEN PROPERTY CUSTODIAN,
Appellant,
v.
RICHARD MAYER ET AL.,
Appellees.

RICHARD MAYER,
Appellant
v.
ALIEN PROPERTY CUSTODIAN ET AL.,
Appellees.

EDWIN REIS ET AL.,
Appellants,
v.
RICHARD MAYER ET AL.,
Appellees.

BRIEF FOR RICHARD MAYER

Time as of which acct. 9/6.1917

Items left off "mark"

Use of assets to Richard Mayer

INDEX

	Page
Proceedings in Courts Below	5
Outline of Facts	7
Statement of Amount of Mayer's Lien and Share	12
1. The Courts below erred in allowing nothing to Mayer for interest or loss of use of the property from the time of its wrongful seizure in 1918 to the time of its return in 1922 (Mayer assignment, R. 162)	18
2. The Courts below rightly failed to provide in the decree for allowances to German employees (Reis assignment 25, R. 162)	22
3. The Court of Appeals rightly held the $4,000 paid for a bond, to be an expense of liquidation (A. P. C. assignment 7, R. 157; Reis assignment 21, R. 161)	24
4. The Court of Appeals rightly held that the cost of regaining possession of the property was an expense of liquidation (A. P. C. assignment 11, R. 158; Reis assignment 24, R. 161)	25
5. The Courts below rightly held that reserves were not a debt (A. P. C. assignment 12, R. 158; Reis assignment 20, R. 161)	26
6. The Court of Appeals rightly held that Mayer was not obliged to account to the Alien Property Custodian for sums paid after April 6, 1917 by his former German partners for German taxes on Mayer individually (A. P. C. assignment 8, R. 157; Reis assignments 17, 22, R. 161)	28

Page

7. The Court of Appeals rightly held that Mayer was not obliged to account to the Alien Property Custodian for sums paid without his continued authority after April 6, 1917 by his former German partners to his relatives (A. P. C. assignment 9, R. 157; Reis assignments 17, 23, R. 161) 31

8. The Courts below rightly took April 6, 1917 for accountability (A. P. C. assignments 3-5, 10, 13-20, R. 157, 158; Reis assignments 5-16, 18, 19, R. 160, 161) 33

9. The Courts below rightly defined in English the German word mark used in a United States Court (A. P. C. assignments 1, 2, 3, 6, R. 157; Reis assignments 1-4, 19, R. 159-161) 52

Conclusion 57

Proceedings in Courts below

The Alien Property Custodian filed this bill in the District Court September 6, 1922, against Richard Mayer — a citizen of the United States, the Richard Mayer Company, the Anglo-American Cotton Company — Massachusetts Corporations, Edwin Reis, Karl B. Strauss, the Estate of Ludwig Reis, and Anny Reis — citizens and residents of Germany. It sets forth the partnership formed in 1914, between Richard Mayer and the German partners, the seizure of property in 1918 by the Alien Property Custodian, the suit of Richard Mayer against the Alien Property Custodian begun April 7, 1919 to recover this property, the final decree for the return of this property, and the actual return of the property in 1922 by the Alien Property Custodian to Mayer. The bill prays (1) that Mayer be ordered to disclose the present value in cash of the assets of Reis & Co. within his possession and control, (2) that the German partners make a disclosure of the assets in their control, (3) that Mayer be surcharged, (4) that the amount due Mayer from the partnership be determined as of the date of the final decree hereunder and Mayer and the corporations be ordered to deliver the surplus after the satisfaction of the amount due him, to the Alien Property Custodian, (5) that Mayer be credited with the value of his interest in the European assets, (6) for process, (7) for general relief.

Mayer and the corporations answered, setting up that he had accounted to the Alien Property Custodian, as per a copy of the account annexed, on June 15, 1922, and admitting and denying, respectively, the different paragraphs of the bill.

The **German defendants** answered, generally admitting the allegations of the bill in the first six paragraphs of their answer, and followed this by a **reply to Mayer's answer,** in paragraphs seven to sixteen inclusive of their answer. On Mayer's motion at the opening of the trial, to strike out the seventh to the sixteenth paragraphs of this answer, the

German defendants waived the seventh to the tenth paragraphs inclusive. They are not before the Court. Exhibit II to this answer was an argument as to the accounts. This was not admitted in evidence and is not before the Court. Exhibits III, IV and V pertain to paragraphs seven to ten of the answer, and were waived with those paragraphs. Exhibit A (pages 1-8, R. 49-53), Exhibit B (pages 1-7, R. 54-56) and Exhibit C (pages 1-16, R. 57-65), purported to be an accounting by the German partners.

The case was heard in the District Court, before Circuit Judge Johnson, beginning March 26, 1923. He decided mainly in Mayer's favor (R. 68-74). A decree was entered accordingly on October 22, 1923 (R. 66, 67). All parties appealed to the Circuit Court of Appeals. The Circuit Court of Appeals decided more favorably to Mayer (R. 149-155). A decree was entered accordingly in the Circuit Court of Appeals September 18, 1924 (R. 155). All parties have appealed to the Supreme Court of the United States.

Outline of the Facts

In 1913 the defendant Richard Mayer became a partner with the defendants Edwin Reis, Karl B. Strauss, and Ludwig Reis (deceased) as Reis & Co., with established houses in Germany, England and the United States. That in the United States, at Boston, was not a mere agency (Garvan Record, p. 97; Opinion, Garvan Record, p. 177). In 1914 and 1915, Mayer organized the Richard Mayer Company and the Anglo-American Cotton Company — Massachusetts corporations — and capitalized them with assets of Reis & Co. in his hands. By June 8, 1915, the shares in the Richard Mayer Company were all in Mayer's name except for a few nominal holders to qualify them as directors (Garvan Record, p. 64; Opin., Garvan Record, p. 178). The shares in the Anglo-American Cotton Company were in the name of Laible, employed as manager. The certificates were endorsed in blank and were in Mayer's possession (Garvan Record, p. 65; Opin., Garvan Record, p. 178; Laible, Record, p. 124).

In 1914 and 1915, Reis & Co. remitted from Germany to Boston upwards of $2,000,000 for the purchase of goods for export. Exportation continued until about the time of the British Orders in Council of March, 1915 (Garvan Record, p. 65; Opin., Garvan Record, p. 178; Garvan Record, p. 97). The unexpended balance of this money constituted the larger part of the assets in America.

In the early part of 1916 Laible was in Germany and there discussed with the German partners the desire of Mayer for a dissolution. They were willing to have a dissolution, but no definite steps were taken (Strauss, Garvan Record, p. 98; Laible, Garvan Record, p. 173; R., p. 124). After his return Laible reported this conversation to Mayer later in 1916, and informed Mayer that the assets of the partnership in Europe had grown so large that Mayer, on dissolution, would be entitled to have as his share of the whole assets, as much as the assets in America (Laible, Garvan Record, p. 173; R. pp. 93–94).

Under date of February 7, 1917, after the breaking off of diplomatic relations between the United States and Germany, an agreement of dissolution was drawn, whereby in event of war the partnership was to be dissolved and the German partners were to retain for themselves the European assets and Mayer was to retain for himself the American assets. Mayer did not know of this agreement until the Spring of 1919. This agreement was held invalid by the Circuit Court of Appeals.

The partnership was dissolved by the outbreak of war April 6, 1917, and thereupon the German partners continued the German business as a going business, and have so continued it for more than six years and as late as the proceedings in the District Court in 1923.

Soon after the outbreak of war, Mayer decided to take the stand that, in view of the conversation as to dissolution which Laible had with the German partners the preceding year, and in view of the relative value of the German assets and of the American assets, he would treat the American assets as his own, and Reis & Co. as having no interest therein.

Mayer had converted all the assets, except the stock in the Richard Mayer Company and the stock in the Anglo-American Cotton Company, into cash, and had invested the cash in his own name.

On May 28, 1918, the Alien Property Custodian seized all the stock of the Richard Mayer Company and of the Anglo-American Cotton Company as the property of Reis & Co. On September 20, 1918, he seized the securities and the cash.

On November 6, 1918, Mayer filed a claim with the Alien Property Custodian for a return of the property, asserting that the partnership was dissolved on the declaration of war April 6, 1917, and that he had taken all the property over as his own, and that he believed the German partners had no claim upon it (Garvan Record, p. 28). On March 31, 1919, he filed another claim, reiterating his right to a return of the property (Garvan Record, p. 26). On April 7, 1919, he

brought suit against Francis P. Garvan, the Alien Property Custodian, for a return of the property, basing his claim on the dissolution agreement above referred to and also on his right to the property because he had taken it for his own and it was not in excess of his share.

When the Alien Property Custodian took control, the Anglo-American Cotton Company had a net worth of $113,977.17 (Ex. Q; Mayer's Ans., Ex. A, R. 41). It became a total loss (Ex. Q).

On the issues made by the pleadings, the Court in *Mayer* v. *Garvan* found the facts and stated them in detail (Garvan Record, p. 177) substantially in accordance with Mayer's contentions and ruled that the dissolution agreement had no legal validity but that Mayer was entitled to a return of the property to satisfy his lien thereon for his share, with the duty to account to the Alien Property Custodian for any surplus after such satisfaction.

June 7, 1922, such property as remained in the hands of the Alien Property Custodian was returned to Mayer.

He immediately made accounting to the Alien Property Custodian showing that there was no surplus to be paid over to him. This account was not approved by the Custodian. The present suit followed. The facts appear in more detail in the record in the Garvan Case, which by agreement of the parties was before the District Court and the Circuit Court of Appeals in the case at bar (R. 80).

In the District Court in the present case, Judge Johnson decided, as had been held in *Mayer* v. *Garvan*, 278 Fed. 27, that the partnership was dissolved by the outbreak of war, and that Mayer had, on April 6, 1917, a lien on the American assets and their proceeds for what was then due him, and was entitled to retain the American assets in his hands until this amount was satisfied. He found that Mayer's share in the German assets, which consisted of real estate, plants, machinery, merchandise, accounts receivable and cash — if expressed in terms of marks was then 2,414,056.12, and that

the value of his share was $574,775.26. He found that Mayer admitted the value of the partnership property in America at that time to be $910,014.07.

Deducting from these American assets a partnership claim of Laible's subsequently paid — $27,175.88, left $882,838.19. Mayer was a twenty per cent. partner. Twenty per cent. of this was $176,567.63. This added to the $574,775.26, gave Mayer's share April 6, 1917, $751,342.89.

Judge Johnson found that there was no evidence to show the domestic value in Germany of the German mark in dollars, or whether the decline in the rate of foreign commercial exchange as shown in this country correctly expressed the decline in the value of the mark in Germany. He decided that the same measure — the gold standard — should be applied to both classes of assets, and that the rate of foreign exchange on paper marks was not the criterion. This decision would have left Mayer entitled on April 6, 1917, to the above amount of $751,342.89. From this amount Judge Johnson deducted certain charges against Mayer and he declined to allow him certain credits which are discussed hereinafter under the appropriate headings.

The Circuit Court of Appeals (R. 149–155) decided in most respects the same as the District Court. The firm of Reis & Co. had a regular firm office in Boston (R. 149). Before the outbreak of war the shares in the two corporations were in Mayer's name or possession (R. 149). By the outbreak of war April 6, 1917 the partnership was dissolved (R. 149). The German partners thereafter continued the German business as a going business and have so continued it on their own account, treating the German assets as their own (R. 149). Mayer, after the outbreak of the war, converted into cash all the American assets except the stock in the two companies and invested the cash in his own name (R. 150). The seizure of the property by the Alien Property Custodian was as the property of Reis & Co. (R. 150). There was no quotation on the foreign commercial exchange value of the

German mark April 6, 1917. There was no evidence to show the value, in Germany, April 6, 1917, of the German mark, or whether the decline in the rate of exchange as shown in this country correctly expressed the decline in the value in Germany (R. 151). This is not a suit to dissolve a partnership or to obtain an accounting for the operations of the partnership after April 6, 1917 (R. 152). By the final decree of May 4, 1922 in the Garvan suit, Mayer is entitled to hold all the assets until his share in the firm assets has been determined (R. 152). As the German partners did not liquidate but continued the business of their own motion, they became liable for the value of Mayer's share of the German assets at the time of the dissolution April 6, 1917 (R. 152). The German assets and the American assets must be measured by a common standard, unaffected by the fluctuations of commercial foreign exchange (R. 173). The $4,000 which Mayer was obliged to pay out as a premium on the surety bond to get back the property, should be allowed as a necessary expense of liquidation (R. 153). As the German partners had appropriated the German assets to themselves, they cannot claim that the moneys paid after the outbreak of war for German taxes were for the purpose of protecting Mayer's interest or for his benefit. Their authority to make any payments for him had terminated before the payments were made (R. 154). The payments made to Mayer's relatives after his authority to make them had terminated on the outbreak of war, should not be allowed (R. 154). Mayer's expenses for counsel fees and other disbursements incurred in the prosecution of the suit against Garvan, should be charged as liquidation expenses incurred by him to get possession of the property in liquidation (R. 154). A majority of the Court were of opinion that Mayer was not entitled to anything between the time when he was wrongfully dispossessed of the property by the Alien Property Custodian and the time when the Custodian returned it to him in obedience to the decree in the Garvan case (R. 155). Reserves and

losses in 1918, 1919 and 1920, when the German partners were conducting the business on their own account, were properly disallowed as a liability (R. 155).

The results of these decisions, and the amounts involved in the various errors assigned, appear in the following schedule: —

Mayer's Share

Value of Mayer's share taken over by the German partners Apr. 6, 1917, as found by Courts as per details below (R. 151, 69)....			$574,775.26
Assets in America Apr. 6, 1917, as so found (R. 69).....		$910,014.07	
Firm debt to Laible, subsequently paid (R. 31)	$27,175.88		
Claimed liability in "Carolyn" case (R. 74), settled Sept. 29, 1925 by agreement of all parties for.....	31,297.51		
		58,473.39	
Mayer's 20% of.....		$851,540.68	170,308.13
Apr. 6, 1917, Mayer's share and lien.....			$745,083.39
Proper compensation for loss of this from wrongful seizure by Alien Property Custodian in 1918 to its return June 7, 1922 (disallowed by majority of Circuit Court of Appeals (R. 155).....			175,000.00
			$920,083.39

Amount which Mayer was entitled to receive back and to retain for himself June 7, 1922			$920,083.39
Amount received back by Mayer as of June 7, 1922, as found by the Courts below (R. 151, 69) as per details below		$828,072.72	
Liquidation expense for bond as found by Circuit Court of Appeals (R. 153)	$4,000.00		
Paid in settlement of "Carolyn" claim Sept. 29, 1925	31,297.51		
Interest claimed by Liable from partnership — in suspense (R. 73)	6,475.28		
Counsel fees and other disbursements (amounts to be determined in the District Court) to regain possession of the property wrongfully seized (R. 154)	x x x x x		
Total of deductions, not including above undetermined amount for counsel fees and disbursements		$41,772.79	
Balance			$786,299.93
Deficiency for Mayer's share and lien, not including the above counsel fees and disbursements			$133,783.46

Details of $574,775.26 — The First Item Above

Dec. 31, 1916 book value gross assets in Germany (Reis, Ans., Ex. A, R. 49-53, R. 87)	M15,802,922.33	
Admitted excess value of land and buildings 506,498 over book value 252,037.66	254,370.34	
Admitted excess machinery value 128,620 over book value 35,455	93,165.00	
Total gross assets Dec. 31, 1916		$16,150,457.67
Gross liabilities and reserves (Ex. A., R. 49-53, R. 87)	4,313,753.92	
Deduct reserves (Garvan Record, p. 146, R. 87; C. C. A. R. 155; D. C. R. 69)	956,814.31	
Total gross liabilities in Germany		3,356,939.61
Dec. 31, 1916 net assets in Germany at real value		M12,793,518.06

Restatement of Above

Dec. 31, 1916 book net assets (Ex. A., R. 51, R. 87)	M11,489,168.41	
Admitted reserves above	956,814.31	
Admitted excess value of land and buildings	254,370.34	
Admitted excess value of machinery	93,165.00	12,793,518.06

Mayer's Share in the German Assets April 6, 1917.

Mayer's interest per books Dec. 31, 1916 (Ex. A., R. 52)	M2,107,499.89
Mayer's 20% of excess value of land and buildings over book value	50,874.06
Mayer's 20% of excess value of machinery over book value	18,633.00
20% of above reserves withheld from Mayer's account	191,362.86
Apr. 6, 1917 Mayer's share of profits from Dec. 31, 1916 (Reis Ans., Ex. C, R. 60)	45,686.31
Apr. 6, 1917 amount of Mayer's share of net value of assets (C. C. A. R. 151; D. C. R. 69)	M 2,414,056.12
This figure translated into English becomes	$574,775.26

Property wrongfully seized by Alien Property Custodian in 1918

May 28, 1918, Richard Mayer's stock in Richard Mayer Co. (Mayer's Ex. A, R. 29) at book value (May 31, 1918)	$447,640.36
May 28, 1918, stock in name of Julius Laible, endorsed and certificates in possession of Richard Mayer, in Anglo-American Cotton Co. (Mayer's Ans., Ex. A, R. 31)—book value (June 1, 1918) (C. C. A. R. p. 149)	113,977.17
September 20, 1918, Richard Mayer's securities in his name and possession (Mayer's Ans., Ex. A, R. 30; Final decree, Garvan Record p. 59)	355,322.13
Total	$916,939.66

Property Returned by Alien Property Custodian
June 7, 1922

(Details Mayer's Ans., Ex. A, R. 33, 34, 36)

Sundry bonds of those taken September 20, 1918, costing $114,491.52—less one bond of the City of Cambridge for $1,000 and one bond of the General Electric Company for $1,000— and having a market value on return June 7, 1922, of about $101,000 and credited at cost	$112,491.52
Part of First Liberty Loan 3½'s taken September 20, 1918	93,000.00
Second Liberty Loan Converted 4¼'s taken September 20, 1918	50,000.00
Shares of Canadian Gasolene Corporation, Ltd., and Gasolene Corporation taken September 20, 1918, of doubtful value but credited back at cost	45,000.00
Three promissory notes taken September 20, 1918, at $30,000 in the aggregate, to which is added at return the accumulating interest at five per cent. from April 1, 1918 to June 7, 1922, making	36,275.00
Sundry small loans taken September 20, 1918 —less $100 principal paid on one	1,675.00
Check of State Street Trust Co. for recently collected income	1,862.75
Draft subsequently received from Treasurer of United States	18,429.87
500 shares stock in Anglo-American Cotton Co., having no assets and having liabilities.	0.00
2,000 shares of capital stock of Richard Mayer Co., assumed to have no liabilities and having a net worth, according to the trial balance of May 31, 1922—rectified by in-	

creasing total of cash in bank and petty cash by $1,282.39, June 8, 1922	469,338.58
Total	$828,072.72

Restatement

April 6, 1917, in Mayer's hands	$910,014.07
1918, wrongfully seized from him by Alien Property Custodian	$916,939.66
June 7, 1922, returned by Alien Property Custodian	$828,072.72

The figures in this schedule will require some rectification to provide an allowance to Mayer as liquidator for the expenses which he has incurred in defending against the partnership liability for $62,595.03 (R. 73) in the "Carolyn" case which has now been settled for $31,297.51.

As appears from the first schedule above, if the decision of the Circuit Court of Appeals is applied and after proper allowance for counsel fees and disbursements not yet determined, there is probably no surplus to be turned over by Mayer to the Alien Property Custodian.

If the Supreme Court differs from the majority of the Circuit Court of Appeals and allows Mayer for the four years during which he lost the enjoyment of the property because of the wrongful seizure of it by the Alien Property Custodian as trustee for the German partners, he will be entitled to a sum which, having regard to interest rates, may be estimated at $175,000. This will not only destroy any possibility of a surplus, but will leave Mayer with insufficient property to cover his own share by considerably more than $100,000.

1. The courts below erred in allowing nothing to Mayer for interest or loss of use of the property from the time of its wrongful seizure in 1918 to the time of its return in 1922. (Mayer assignment, R. 162)

The Alien Property Custodian wrongfully seized from the liquidating partner, Mayer, in 1918, property of the value of $916,939.66. Mayer was entitled at that time to have and retain from it as his own, $745,083.93. He demanded it back in 1918. He was wrongfully deprived of the use of that amount for four years. The final decree in *Mayer* v. *Garvan* has established this as *res adjudicata*, between the Alien Property Custodian and Mayer.

By the partnership agreement itself (Garvan Record, p. 20) and by the law, Mayer was the liquidator of the American assets on dissolution. The partnership was dissolved by the outbreak of war April 6, 1917.

If the Alien Property Custodian had taken this property, not as a public official, he would have been personally liable for damages for its detention. As he took it as a public official under the forms of law, he escaped that personal liability. But Mayer nevertheless suffered the four years' loss of the use of the property.

The Alien Property Custodian took the property as the property of the Germans and for the Germans. While it was in his possession it was, as far as Mayer was concerned, in the possession of the Germans. The Alien Property Custodian, who, for the Germans, took this property away from the American partner, is now, for the Germans, asking Mayer to account for any surplus. Under the Act of Congress directing return, part of it will go to them at once, and all, eventually. Before the American partner turns over any surplus he should be made whole for the four years in which he was deprived of the use of the property. Of course the use of the property was worth more to Mayer than it is to be expected that the Alien Property Custodian would

make out of it during the period of his custody. He took $916,939.66. He returned $828,072.72.

Measured by interest rates, the four years' loss of the use of $745,083.39 would be worth approximately $175,000.00.

The six per cent. interest rate is the proper measure of the damages for the detention.

> *Hicks, Alien Property Custodian* v. *Guinness*, Nov. 16, 1925 — 46 Sup. Ct. Rep., p. 46.
>
> *Miller, Alien Property Custodian* v. *Robertson*, 266 U. S. 243, 258.

As the claim is against this private fund and not against the United States or its officer as such, the rule of sovereign immunity from liability for interest has no bearing.

> *Miller, Alien Property Custodian* v. *Robertson* 266 U. S. 243, 257.

No satisfactory reason can be assigned why the American partner should be obliged to suffer this loss. He did nothing wrong. Immediately after the property was wrongfully taken he petitioned in 1918 for its return. The Alien Property Custodian resisted, and continued to hold the property for the German partners. He was the one, by law, to hold the share of the German partners. As far as Mayer was concerned, the German partners held their share, and much more, by this seizure.

Until Mayer has the $745,083.39 above all proper disbursements, and an additional sum of something like $175,000.00, he has received no more than he ought to have and there is no surplus which he ought to pay over.

During this same period from April 6, 1917, the German partners had not only their own share but what had been Mayer's share of the German assets. They have had those assets, with their earning capacity, ever since April 6, 1917. For those earnings they are not called upon to account to Mayer. The German partners kept all the benefits of this

use. On the other hand, by the decree below Mayer gets nothing to recompense him for the loss of the use of his share. The Alien Property Law ought not to impose this loss on a loyal American citizen not required for the protection of the public interests, and going to benefit only the German partners who have had the actual use of the German share during all the time.

In *Hugh Stevenson & Sons, Ltd.* v. *Aktien-Gesellschaft*, 1918 Appeal Cases, 239; 118 L.T. N.S. 126 in the House of Lords; 115 L.T. N.S. 594 (1917) 1 K.B. 842 in the Court of Appeals; 114 L.T. 180 (1916); approved by this Court Nov. 16, 1925 in *Hicks, Alien Property Custodian* v. *Guinness*, 46 Sup. Ct. Rep., p. 47, the House of Lords and the Court of Appeals were of the opinion that to let even the loyal partner take the property without payment for its use in the interval would be a confiscation of the value of that use, namely, a confiscation of the best measure of that value, interest during the interval. If the loyal partner ought to pay interest to the enemy partner, *a fortiori* ought the loyal partner to receive interest when the enemy partner by his representative, the Alien Property Custodian, has deprived him of that use.

Clay v. *Field*, 138 U. S. 464, 473.
Hutchins v. *Page*, 204 Mass. 284.

This is not a claim for interest on balances properly in the hands of a liquidating partner. It is the claim that Mayer wrongfully deprived of the property in 1918, should be left as well off as if that wrong had not been done him by the German partners through their representative, the Alien Property Custodian.

It could be conceded without affecting this case, that interest as such does not run upon a debt due from an enemy, presented to the Alien Property Custodian for payment out of the enemy's funds (*Brown* v. *Hiatts*, 15 Wall. 177; *Hoare* v. *Allen*, 2 Dallas 102; *Agency of Canadian Car and Foundry Co.* v. *American Can Co.*, 258 Fed. 363 (C. C. A. 2d); *Stand-*

ard Silver Lead Mining Co. v. *Garvan*, No. 3345 D. C., E. D. Washington; *United States* v. *Bayard*, 127 U. S. 251; *In re Krupp*, (1916) 2 Chancery 194 — 114 L.T. N.S. 1026. Such a holding rests on the principle that inasmuch as the enemy cannot lawfully pay the debt during the war, he is not liable for interest.

This rule does not apply to damages by way of interest on money or property withheld after demand which should have been complied with, and lawfully could be complied with.

Hicks, Alien Property Custodian v. *Guinness*, 46 Sup. Ct. R. 47.

Miller, Alien Property Custodian v. *Robertson*, 266 U. S. 243, 258.

Miller v. *Humphrey*, 7 Fed. (2) 330 (C. C. A. 9th Cert. Nov. 1925).

Mayer demanded return in 1918. Thereafter he should not be deprived of the use of his share, wrongfully, by the Alien Property Custodian and yet be obliged to account to the Alien Property Custodian as for a surplus for the benefit of the German partners, when Mayer is to come out of the transaction without even his whole principal intact and the enemy partners are to keep without accountability all that has resulted from the use of the property in Germany since April 6, 1917. Neither law nor equity contains any principle which requires the giving of such an advantage to enemy partners at the expense of such hardship to the loyal American partner.

2. The courts below rightly failed to provide in the decree for allowance to German employees. (Reis assignment 25, R. 162.)

The defendant German partners and not the plaintiff Alien Property Custodian, assign error in this particular (R. 162). As this is a suit of the Alien Property Custodian alone against Mayer, it would seem that Mayer should not be called upon to meet an assignment of error which the Custodian does not make. The German partners were joined merely to get into the case their accounting of the German assets for its bearing on Mayer's accountability if any to the Alien Property Custodian. The plaintiff represents the entire rights against Mayer, to accountability. The accidental defendants should not be heard as plaintiffs in the same interest.

The four employees — Ely and others — appear to have been profit-sharers under their contracts. They were not entitled to any interest in the assets themselves. Their percentages were not based on the assets. They were based on the profits. Reis has testified that they have been paid their percentages as to the profits made in Germany. There is nothing in the record to show whether any profits were made in America, or, if so, the amount of these. They were comparatively small. In the great export business the profits went to the books in Germany and not in America (R. 91). The assets remaining in America were very largely what remained of the capital remittances from Germany, and not profits (R. 89, 90). The impossibility of determining that there was anything due to these profit-sharing employees is sufficient ground for refusing to make any allowance on account of it.

But, even if the profits could be determined so that the amount of percentages of Ely and others could be reckoned, still they should not affect the American assets. Ely and others are employees in Germany. They have presented

no claim. These German employees should not be paid in America out of the American assets. Laible, whose percentage was based on both the American and the German profits, was an employee in America and he was paid wholly out of the American assets. Ely and others are payable, if at all, out of the German assets. They have no interest in the assets as such.

Ely and others were alien enemies. For the debts due them they could not maintain an application for payment to the Alien Property Custodian because they were enemies and so not within Section 9 of the Trading with the Enemy Act.

If these debts of the partnership are to be paid in America, then, under the terms of Section 8 (a) of the Trading with the Enemy Act and under the terms of the decree in the Garvan Case, Mayer is to pay them and he should, therefore, retain more rather than less money before there is any surplus to be paid over to the Alien Property Custodian. The only thing which Mayer is to turn over to the Alien Property Custodian is any surplus that there may be after the payment of the debts and the satisfaction of his lien. No part of the sum turned over by Mayer to the Alien Property Custodian would go to Ely and others. What if anything is due them, is not surplus.

There was no error in the decrees below in this respect.

3. The Court of Appeals rightly held the $4000 paid for a bond, to be an expense of liquidation. (A. P. C. assignment 7, R. 157; Reis assignment 21, R. 161)

When the Alien Property Custodian wrongfully seized the assets from Mayer in 1918, Mayer was entitled to the possession of them as the liquidator for the partnership which was terminated April 6, 1917. Any expense properly incurred in regaining possession was an expense of liquidation. It is a mere accident that the wrongful dispossessor was the Alien Property Custodian. He might have been a private *tort feasor*. The expense was the same.

The decree after mandate in *Mayer* v. *Garvan* for the return of the property to Mayer, was final. It was based on the fact that Mayer, as the American liquidating partner, was entitled to possession of all the assets in America as the liquidator for the partnership. This is *res adjudicata*.

In order to persuade the Alien Property Custodian not to appeal from that decree to the Supreme Court, and so in order to get performance of the decree by the Alien Property Custodian, the liquidator — Mayer — was obliged to spend $4,000 as a premium on a surety bond which the Custodian exacted before performing the decree (R. 80). Mayer got no benefit from the payment. The only good which it did was to assure the Alien Property Custodian that when the litigation was over, any surplus which might be due to the Alien Property Custodian as a representative of the other partners, would be forthcoming. The bond was wholly for the protection of this surplus, and not for the protection of Mayer's share. The expense should be borne by this surplus, and not wholly by Mayer. It was a wise expenditure. It was much less than the cost of defending against a futile appeal to the Supreme Court. It was, accordingly, a necessary and proper expense of liquidation.

4. The Court of Appeals rightly held that the cost of regaining possession of the property was an expense of liquidation. (A. P. C. assignment 11, R. 158; Reis assignment 24, R. 161)

The argument for this is largely a repetition of what has just been said under heading 3. The Alien Property Custodian wrongfully took the property from the liquidator — Mayer. It was his duty as liquidator to get it back. *Mayer* v. *Garvan*, 278 Fed. 27, 35, settled that he had been entitled to possession of the property as liquidator from April 6, 1917. He could not get the property back without going to expense. He first made application to the Alien Property Custodian for the return of the property. This did not prevail. He was obliged to bring suit. It was successful. It restored the assets of the dissolved firm to the proper custody. It would seem that no one could doubt that if the wrongful taker of the property were a thief or private adverse claimant, the expenses of getting the property back would be an expense of liquidation properly chargeable against the fund recovered and not to be paid out of the personal funds of the liquidator. It is no different where the wrongful seizure is made by a public official under claim of right. The wrongful seizure was antagonistic, not only to Mayer, individually, but also to Mayer as the liquidator. The counsel fees and disbursements in the applications for a return of the property and in the suit, were proper, necessary, and unavoidable expenses of liquidation. Mayer should not bear the burden alone.

5. The Courts below rightly held that reserves were not a debt. (A. P. C. assignment 12, R. 158; Reis assignment 20, R. 161)

Mayer's share was his part of the surplus of the gross assets over the gross liabilities. This was not affected by the fact that a part of this surplus was carried in capital accounts, in reserve accounts, or in surplus accounts. The gross assets in Germany were land and buildings, plant and machinery, furniture and fittings, tools and utensils, merchandise, accounts receivable, investments, cash, and bank balances. The uncontradicted testimony is that the land and buildings, and plant and machinery, were worth April 6, 1917 more than the book value (R. 85, 87). The undisputed testimony is that the other assets were worth their book value and produced their book value (R. 82, 85, 91). It follows that the gross assets were worth, book value, M15,802,922.33 (Ex. A, R. 49–53, 87), plus land and buildings excess M254,370.34, and machinery excess M93,165 — a total of M16,150,457.67.

The gross assets yielded more than this sum.

To pay all the liabilities it took M3,356,939.61 (R. 85, 86; Garvan Record, 146). This left M12,793,518.06 as the net assets.

Reis says that Mayer should have no part in 950,814.31 because this sum was legitimate reserves. He admits, however, that they existed April 6, 1917 and then belonged to all the partners (R. 88).

It is immaterial whether the reserves were fairly and honestly set up as reserves instead of surplus. The fact remains, that they were not liabilities. They were owed to no one. They were just as much net assets of the firm as was the book surplus (R.88).

Reis says that they were more than exhausted, but this means that they were exhausted in the course of business after April 6, 1917. They were exhausted in the new busi-

ness wholly,— not in the business of the old firm. If they had not been taken up in the new ventures, the German partners would have been obliged to meet an equal part of the new ventures by sustaining greater losses or by sustaining lessened profits.

It is submitted that it is unanswerable that on April 6, 1917 the book value of the gross assets was M16,150,457.67, and the gross actual liabilities 3,356,939.61, and that therefore the net assets were 12,793,518.06, regardless of whether those assets were carried in the form of capital account, surplus account, or reserve account.

Book figures are valuable, not as a finality but as evidence of actual values. If it is shown that the gross assets had the actual value stated, and that the liabilities were no more than the amount stated, the balance must be net assets. That is the sum from which the amount of Mayer's percentage is to be determined. There is no reason why the German partners should keep all the reserves for themselves, or to expend in the new business after dissolution.

Strauss recognized that both the good-will and the reserves were items to be credited in determining Mayer's share (Garvan Record, 101). Mayer's share, computed from the German assets, was his percentage of the real value of the gross assets less the real liabilities. The reserves were not liabilities. They were not a debt. The Courts below properly so decided (R. 155, 69).

6. The Court of Appeals rightly held that Mayer was not obliged to account to the Alien Property Custodian for sums paid after April 6, 1917 by his former German partners for German taxes on Mayer, individually. (A. P. C. assignment 8, R. 157; Reis assignments 17, 22, R. 161)

The decision of the Circuit Court of Appeals was right, for at least four reasons:

(1) This payment was not chargeable to Mayer. When this payment was made during the war, after April 6, 1917, it appears that Mayer had no property in Germany. The German former partners had taken over his share for the new business which they had elected to continue. This has been adjudged. Thereby they rendered themselves accountable to Mayer for the value of his share. This accountability was not a debt due to Mayer, because he already had in his hands in America as much as this. The tax was a tax of the German government against Mayer, who was a citizen of a country at war with Germany. The payment was made by these enemy partners voluntarily to the German government without any authority from Mayer. The amount was M266,434.40. The payment was on December 10, 1917, some eight months after the outbreak of the war and the appropriation of Mayer's interest by the German partners (R. 154). The payment was not made for the protection of any interest of Mayer's, or for his benefit. The war had terminated any authority. The German partners did not act as trustees for the protection of his interest, for that interest they had appropriated to themselves (R. 154). Not only did he not authorize his former partners to pay any tax to Germany after the outbreak of the war, but no such authorization could be implied and payment by Mayer would have been a disloyal act. The tax was not on the partnership. It was on Mayer, personally. There is nothing to show that it was rightfully assessed. Mayer had a right to contest it. The German partners are seeking to set up a

credit on account of the payment. They have not shown that Mayer was liable. They have shown only that they paid the money without Mayer's authority. He had the right to abstain from paying taxes to the enemy during the war. It is clear that one person cannot make another his debtor by paying, voluntarily, a tax on the latter without the latter's request or consent.

Homestead Co. v. *Valley R. R.*, 17 Wall. 153, 166.
Litchfield v. *County of Webster*, 101 U. S. 773, 778, dictum.
Sherman v. *Savery*, 2 Fed. 505, 516 (D. C. Ia.), dictum.
Irvine v. *Angus*, 93 Fed. 629, 633 (C. C. A. 9th), dictum, reversing 84 Fed. 127, 130 (C. C. Cal.).
Bender v. *King*, 111 Fed. 60, 67 (C. C. Mont.).
Foote v. *Cotting*, 195 Mass. 55, 63, dictum.
Keener Quasi Con., p. 388.

(2) Even legitimate debts of a partner paid by the other partners without an agreement that they shall be a part of the partnership accounting, are not to be taken into account in determining the partner's share in the partnership assets.

Goldthwait v. *Day*, 149 Mass. 185, 188.
Shearman v. *Cameron*, 76 N. J. Eq. 426 — 74 Atl. 979.
Caldwell v. *Leiber*, 7 Paige 483, 507.
Reid v. *McQuesten*, 61 N. H. 421.
O'Lone v. *O'Lone*, 2 Grant Chancery, Upper Canada, 125.
Looney v. *Gillenwaters*, 11 Heiskell (Tenn.) 133, 136.
Payne v. *Martin*, 39 Colo. 265 — 89 Pac. 46.
Smith v. *Newhouse* (Missouri), 199 S. W. 938, 942.
Bishop v. *Pendley*, 138 Ga. 738 — 76 S. E. 63.
Nims v. *Nims*, 23 Fla. 69.

(3) The subsequent payment of these personal taxes did not diminish the share which, on April 6, 1917, Mayer had in the partnership assets.

(4) The Alien Property Custodian's interest in the American assets could not grow larger after April 6, 1917 because of disbursements, not for partnership debts, made in Germany by the enemy partners after April 6, 1917.

7. The Court of Appeals rightly held that Mayer was not obliged to account to the Alien Property Custodian for sums paid without his continued authority after April 6, 1917 by his former German partners to his relatives. (A. P. C. assignment 9, R. 157; Reis assignments 17, 23, R. 161)

The Circuit Court of Appeals was right, for at least four reasons:

(1) There is no basis for charging these payments against Mayer. Approximately 50,000 marks were paid after April 6, 1917, and mainly in the years 1918 to 1921 inclusive (R. 64, 87.) Apparently they were friendly — and certainly voluntary — payments. In like way, Mayer has paid to Stadeker (a relative in America of Edwin Reis') $7,050 (R. 94) for which he was given no credit in the accounting. Any authority to the German former partners to make these donations to Mayer's relatives on Mayer's account, was terminated by the outbreak of war. The German enemies could not, by making the donations thereafter, increase their interest in the American assets or diminish Mayer's interest in those assets from the amount thereof on April 6, 1917.

(2) Even if these donations had been legally chargeable by the enemy partners to Mayer, while failing to meet similar payments made by Mayer to Edwin Reis' relatives, they would form no part of partnership accounting nor affect the surplus if any which Mayer should pay to the Alien Property Custodian.

Goldthwait v. *Day*, 149 Mass. 185, 188.
Shearman v. *Cameron*, 76 N. J. Eq. 426 — 74 Atl. 979.
Caldwell v. *Leiber*, 7 Paige 483, 507.
Reid v. *McQuesten*, 61 N. H. 421.
O'Lone v. *O'Lone*, 2 Grant Chancery, Upper Canada, 125.
Looney v. *Gillenwaters*, 11 Heiskell (Tenn.) 133, 136.

Payne v. *Martin*, 39 Colo. 265 — 89 Pac. 46.
Smith v. *Newhouse* (Missouri), 199 S. W. 938, 942.
Bishop v. *Pendley*, 138 Ga. 738 — 76 S. E. 63.
Nims v. *Nims*, 23 Fla. 69.

(3) The subsequent making of these donations did not diminish the share which on April 6, 1917 Mayer had in the partnership assets.

(4) The Alien Property Custodian's interest in the American assets could not grow larger after April 6, 1917 because of disbursements, not for partnership debts, made in Germany by the enemy partners after April 6, 1917.

8. The Courts below rightly took April 6, 1917 for accountability. (A. P. C. assignments 3-5, 10, 13-20, R. 157, 158; Reis assignments 5-19, R. 160, 161)

a. The declaration of war dissolved the partnership *ipso facto* April 6, 1917, regardless of agreements, intentions, or wishes of the parties (*Mayer* v. *Garvan*, 270 Fed. 229; 228 Fed. 27). There was only one partnership in this case, no matter how many seats it had. On the outbreak of war that partnership was composed of a citizen of the United States and of three enemies of the United States. It is the settled law, and it is also *res adjudicata* between the Alien Property Custodian and Mayer, " that the said partnership of Reis & Co. was dissolved by operation of law upon the outbreak of war between the United States and the Imperial German Government on April 6, 1917." That is the only partnership involved. Whatever the law of Germany may be, it is not legally possible for a citizen of the United States to be in a partnership in the United States or in Germany, or anywhere else, with enemies. If a partnership had continued to exist, the business done by the partners would be as agents for all the partners, loyals and enemies alike. An agent cannot lawfully conduct a going business for enemies, even within loyal lines. *Montgomery* v. *United States*, 15 Wall. 395. On the dissolution April 6, 1917, a lien in Mayer's favor attached to all the American assets to assure him of the payment of all the partnership debts and to assure him that he would receive all that he ought to receive from the enemy partners on account of the German assets. By the decree in the Garvan case, it is *res adjudicata* " that the complainant on the dissolution of the partnership by the outbreak of the war had a lien on the American assets and their proceeds for what was due him from the partnership on an accounting of the affairs of the partnership and was entitled to retain the American assets in his hands until the satisfaction of the amount due him on such accounting."

There is no date to which this **was** can apply except April 6, 1917. What "was" then due Mayer was to be determined by offsetting the amount of the net assets of the partnership in his hands against the amount of the net assets in the enemy partner's hands. These were fixed facts, even if each, because of lack of means of communication, was ignorant of the facts known to the other. The accounting to be made when cessation of hostilities rendered it possible would disclose the amount of the relative obligations of the one partner to the other, but it would not create the obligations, or the amount of them. The accounting **defines** the liability. It does **not create** it.

b. This is a suit to compel Mayer to pay over the surplus. It is not a suit to dissolve a partnership or to compel an accounting for operations of a partnership existing after April 6, 1917. In the Garvan case it was decreed " that the plaintiff [Mayer] shall hold possession of the money and property so delivered to him under the terms and provisions of Section 8 (a) of the Trading with the Enemy Act and with the rights and duties in respect thereof which are set forth in paragraph 10 of this decree." Under Section 8 (a), Mayer's right, as a holder of this lien, was " to continue to hold said property " and " to dispose of the property in accordance with law," and his duty was " that if on any such disposition of property a surplus shall remain after the satisfaction of the lien or other right in the nature of security, notice of that fact shall be given to the President pursuant to such rules and regulations as he may prescribe, and such surplus shall be held subject to his further order." In short, Mayer's duty is to pay over any surplus **after** the property has been disposed of and **after** his lien has received **satisfaction.** The bill of complaint does not purport to be one to dissolve a partnership. It does not ask that the German partners be required to do anything except to disclose the value of the assets in their control. The dissolution does not take place at the date of the de-

cree. The bill does not ask that anything be turned over to the Alien Property Custodian except the surplus which shall remain **after the satisfaction** of the amount due to Mayer.

c. Until Mayer's lien has been satisfied he is under no obligation to turn over anything to the Alien Property Custodian. Unless, therefore, the German defendants have so treated the German assets that Mayer's interest in them has ceased, he has not received satisfaction of his lien for that interest and the time for ascertainment of the surplus has not arrived and Mayer is under no obligation at present to turn anything over to the Alien Property Custodian. If, on the other hand, Mayer's interest in the German assets has ceased, and he has acquired a right to charge the German partners with the 1917 price of that interest and to satisfy his lien for that amount out of the assets in his hands, then, if there is a surplus after that satisfaction, he is under obligation to turn it over to the Alien Property Custodian. There is no basis for a decree in this case to order any assets sold. There is no occasion to value any assets unless the person charged with them is to be treated as having become the purchaser of them from his former partner or partners at that value.

d. The Reises and Strauss should be treated as purchasers April 6, 1917. It seems not to be disputed that they did not liquidate. On the contrary, they continued to use the German assets in a going business after the dissolution, April 6, 1917. The Court has so found (R. 149). Reis testified that they went right on. The books were not closed as of April 6, 1917. The old assets and the new were commingled indistinguishably. Monies received on old account and on new were commingled in the same bank accounts. Old merchandise and new merchandise were kept together. The factories were used without interruption for a single continuing business, and this has gone on for

six years and was still going on at the time of the trial and very likely is still going on. No assets were ever set aside as funds received in liquidation, either for all the late partners or for Mayer (R. 88, 89). The business has continued without interruption, to date, and the assets have continued to be and are now used " in the ordinary course of a going business " (R. 88, 89). The Reises and Strauss and later Leiser conducted this business after dissolution April 6, 1917, for their own account, as is shown by the action of the German defendants to the very close of the trial. They have purported to account, but they have made no account of the profits of the going business, and they have made no showing as to the assets now in that business. They have assumed that none of the assets except the Friedrichsfeld land, buildings, and machinery are assets to be specifically accounted for. If the business was conducted in any respect for account of Mayer, it was the whole business. There was not a new and an old business going on at the same time. There was one business. That was the business in which the assets were used. Clearly, the German defendants recognized that they were not conducting the business for Mayer's account, and were conducting it for their own account. At the beginning of 1920 they took in a new partner, Leiser (R. 88), without any communication with Mayer and without any consent from him. The Herzberg plant was used for two years and then sold. (R 88). The Franzensthal plant was used for three years and then sold. This was done without the agreement or consent of Mayer. Both these sales were after the Armistice, and after Strauss was in communication with Mayer (Exs. D, E, F—R. 95). Counsel for the German defendants informed the Court that Strauss was in Boston in condition to testify during the trial in March, 1923. His only testimony is that introduced in the Garvan record, page 96: " We did business under this partnership agreement until it ceased in 1917, after which time the firm consisted of Mr. Edwin Reis, Mr.

Ludwig Reis and myself until in January, 1918, Mr. Reis died. Then the firm consisted only of Mr. Edwin Reis and myself, and in 1919 Mr. Alex Leiser who had been bonus sharing in previous years was made a partner. We really had no regular connection with our Boston office or with Richard Mayer after the importations had practically stopped — the only proper information we got was when Mr. Laible came to Europe at the end of 1915 and in 1916." (Garvan Record, p. 97.) "During Mr. Laible's visit in 1916 my European partners and I talked with him about Mr. Mayer's getting out of the firm. There had been a number of differences of opinion between Ludwig Reis and Mr. Mayer, the differences beginning shortly after Mr. Mayer had become a partner" (Garvan Record, p. 97)." Mr. Laible reported upon Mr. Mayer being very angry and being fed up with the way Ludwig Reis had been going on, and Ludwig replied to him that he did not care about Mayer's being angry and would not care if Mayer would go where he came from. Mr Laible reported that Mr. Mayer said that he wanted to get out of the partnership as he was tired of the way Ludwig Reis was carrying on. At the conversation there were present Ludwig Reis, Edwin Reis, Laible and myself. I do not think that any special instructions were given to Mr. Laible to carry back to Mr. Mayer relating to that matter. Nothing definite was arranged excepting that he was given to understand that if Mr. Mayer really did want to get out there would be no particular objection to it. Laible had no specific order from Mr. Mayer or from us" (Garvan Record p. 98). "After April 6, 1917, the date of the beginning of the war with America, Edwin Reis, Ludwig Reis and I treated the German assets of the firm entirely as our own. In 1919 we sold the Baumwollbleicherei, Herzberg, to the Borvisko Company of Berlin and America, and in May, 1920, we sold Algersdorf to a Cschechoslovakian concern. The liquid assets changed continually. The assets of both companies which I mentioned included real

estate" (Garvan Record, p. 98). "We also sold land at Friedrichsfeld to various people, about four or five" (Garvan Record, p. 99). "We knew the European assets to be about Marks 11,500,000 at the end of 1916. Book value only. That last figure at the rate of 4.20, which was the rate laid down in the partnership agreement, amounts to at least $3,000,000 if you considered the good will and reserves of the business. That would mean that the total assets, American and European together, were $3,650,000, and of this total Mr. Mayer was entitled to 20% under the partnership agreement, or something like $700,000" (Garvan Record, p. 101). "We ascertained the share of Mr. Mayer in the European assets per end of 1917 and divided those among the partners Edwin Reis, Ludwig Reis and myself" (Garvan Record, p. 109). Price, Waterhouse & Company examined the books in August, 1920. They complained of the fact that they were not shown the books prior to December 31, 1916, to enable them to verify the balances of that date. The balances as they found them are in accordance with the balances as of that date put in evidence at the trial in March, 1923 (Record, p. 114). Edwin Reis has produced a private ledger which he says was not shown Price, Waterhouse & Company, on which there are certain entries under the name of Richard Mayer. Those made after 1916 were not made by Reis. Price, Waterhouse & Company say (Garvan Record, p. 123): "We have closely examined the capital accounts of the partners of the firm. Particulars of these are contained in two small books which we are informed are kept by Mr. Edwin Reis personally. The first book contains only the capital accounts relating to the Friedrichsfeld Factory, whilst the second book contains the Kapok, Herzberg, Franzensthal Factory and Swiss Bank and Investments capital accounts. All of these accounts with the exception of the Herzberg and Swiss Bank and Investment accounts, are kept on the usual double entry system. We refer later in this report to the method adopted in

respect of these. In order that we should be able to satisfy ourselves as to the genuineness of these books we should, in our opinion, be allowed access to the general books of account relating to the periods prior and subsequent to the year 1917." It will be noted that it was the general books of account and not these private capital accounts which Price, Waterhouse & Company were complaining of not seeing, and that the description of the books which they did see accords with the books produced at the trial by Reis. Price, Waterhouse & Company describe the partners' capital accounts which they saw (Garvan Record, p. 124) and say that: " Richard Mayer's account has not been credited with any share of the profits for the year 1917, the whole of this, amounting to M.604,332.54, having been divided amongst the remaining partners and the procuration holders in the following manner." They follow this by detail figures to show that it went to the procuration holders and to the account of Edwin Reis, Ludwig Reis and Karl B. Strauss. They say that the whole of Richard Mayer's account, capital and profits, was transferred on July 1, 1917, on this Friedrichsfeld capital account to Edwin Reis, Ludwig Reis and Karl B. Strauss (Garvan Record, p. 125). Referring to the private ledger, they say that the balance standing to Richard Mayer's credit July 1, 1917, was divided among the other three partners (Garvan Record, p. 128). As to the Herzberg capital accounts, they say that the balance of Richard Mayer's capital account at July 1, 1917, was divided among the other three partners (Garvan Record, p. 130). As to the Franzensthal capital accounts, they say that as shown in the private ledger, Richard Mayer's capital account was divided among the other three partners July 1, 1917 (Garvan Record, p. 131). As to the Swiss Bank Account and Investment Accounts, they say that on the private ledger these stood to the credit of the four partners December 31, 1916, and that according to the private ledger these stood on December 31, 1917 to the credit of

the three partners only, and that Richard Mayer's share had been carried to the accounts of the other partners on July 1, 1917 (Garvan Record, p. 132). They saw not only the partners' private accounts, but also the journalization of the transfers from Mayer to the other three partners (Garvan Record, p. 140). It thus appears that Price, Waterhouse not only do not complain of not seeing the private ledgers but that they actually did see them and saw the transfers thereon of Richard Mayer's capital and profit credits to the other partners. This is an emphatic declaration that the German partners were conducting the business for their own account. They were undoubtedly aware that Richard Mayer had in his own hands in the United States, sufficient to cover his share both in Germany and in the United States. These entries on the books which Price, Waterhouse & Company saw have not been contradicted in any way. In view of the fact that Mayer had in his own hands enough to cover his share, these entries were the natural ones to make to appropriate to the three German partners Mayer's share in their hands to cover what was due from Mayer on account of the American assets. Unless it be the bald assertion by Reis of a state of mind, six years later, there is nothing in conflict with this overwhelming evidence that the business in Germany after April 6, 1917, was for the account of the German defendants. There can be no question but that the finding of fact below was warranted, that " the German partners thereafter continued the German business as a going business and have so continued it on their own account, treating the German assets as their own " (R. 149).

e. In addition it is *res adjudicata* that the Reises and Strauss conducted this business for their own account after April 6, 1917. The entire record in Mayer against the Alien Property Custodian — No. 925 — was before the Court by agreement of all parties, and in accordance with this agreement the Court took judicial notice of it (Record, p. 80). Mayer alleged in the 32d paragraph of the bill of complaint

in that case that on April 6, 1917 the European partners had taken to themselves all of the European assets of Reis & Co. and terminated any interest of Mayer therein (Garvan Record, p. 7). The Alien Property Custodian expressly denied these averments (Garvan Record, p. 41). Strauss testified that: "After April 6, 1917, the date of the beginning of the war with America, Edwin Reis, Ludwig Reis and I treated the German assets of the firm entirely as our own" (Garvan Record, p. 98). "We ascertained the share of Mr. Mayer in the European assets per end of 1917, and divided those among the partners Edwin Reis, Ludwig Reis and myself" (Garvan Record, p. 109). The report of Price, Waterhouse & Company, the accountants appointed by and for the Court, to investigate the books, was to the same effect (Garvan Record, pp. 124-140). On the issue thus made by the pleadings, the Court found that: "The partnership had its chief place of business in Germany, but it also had established houses in England and the United States (Garvan Record, p. 177). When the war broke out between the United States and Germany the European partners took over all the European assets and treated them as their own and themselves as the only partners remaining in Reis & Co." (Garvan Record, p. 179). On the same issue the Circuit Court of Appeals found that: "War was declared by the United States against Germany April 6, 1917, and after that date the German partners treated the German assets as their own and conducted the business in Europe as if Richard Mayer had no interest in it." On the state of facts so established, the Court decreed: "That the complainant [Mayer] on the dissolution of the partnership by the outbreak of the war had a lien on the American assets and their proceeds for what was due him from the partnership on an accounting of the affairs of the partnership and was entitled to retain the American assets in his hands until the satisfaction of the amount due him on such accounting." What was due the complainant, as provided in this decree,

was based on the adjudged fact that the German partners had taken over the German assets as their own. That is *res adjudicata.*

Oklahoma v. *Texas,* 256 U. S. 70, 85.
Myers v. *International Trust Co.,* 263 U. S. 64.
United States v. *Moser,* 266 U. S. 236.

f. Mayer did not consent, or contract with his enemy former partners, that they might conduct a going business in Germany for his account. He had no communication with Reis after April 6, 1917 (R. 88). He had no communication with Strauss after April 6, 1917, before 1919. He had no communication with his brother, Karl Mayer, after April 6, 1917, before 1919. On April 7, 1919 Mayer sued in the District Court of the United States for the District of Massachusetts, alleging that the partnership had been dissolved April 6, 1917 and that he claimed all the American assets as his own and that the German partners had taken all the German assets as their own and had terminated his interest therein. The German partners had received notice of this claim (Garvan Record, p. 67). This was a most emphatic communication by Mayer to his former partners that he claimed that the German business had not been done for his account since April 6, 1917, and that he did not consent to its being done for his account. The first letter which Strauss received from Mayer was over a year later, July 7, 1920 (Garvan Record, p. 105). It does not appear that this related in any way to business affairs. Strauss' letters to Mayer, from the first one July 4, 1919, to the last one, September 22, 1921 (Exs. D to H — R. 95, 96), show that he was not hearing from Mayer in the earlier period and that he had no thought that Mayer supposed the business in Germany was being conducted in any way for Mayer's account. As late as March 9, 1920, he says: " Business in Europe is picking up slowly, especially for us not having any proper American organization to support us with offers, which is

rather a handicap." On November 4, 1920, he says, " I hope your case will take a favorable end soon, and then you will have the means available for starting a right business again." On September 22, 1921, he says, " I also would like to discuss *my own* future plans with you as I think seriously of coming to live over here. All these matters are quite as important as your darned old law suit. Dash it all, they have to give you *your* money back sooner or later anyhow." (Italics not in original.) Apparently Mayer did not write Strauss anything about the business. If there was any such letter bearing against Mayer's contention, it would have been put in evidence. At the request of the plaintiff and of the German partners, Karl Mayer's letters to his brother Richard, and letter book copies of those from Richard to Karl, were produced at the trial. It does not appear that any of them contained any indication of knowledge on Richard Mayer's part that the German business was being done on his account or that he consented thereto. Reis says that the first time that he saw any letter from Richard Mayer to Karl Mayer was one written the latter part of 1919. He does not remember that it contained anything about the business of Reis & Co. The same is true of the next letter. Reis says that he saw the second or third letter, that of February 9, 1920, and may have seen one or two before that. It is agreed that none of the letters in the copy-books from Richard Mayer to Karl Mayer have any bearing, except those which have been put in evidence. None of these show any knowledge or consent by Mayer. The letter of February 9, 1920 contained nothing of importance. The letter of March 13, 1920 states that it was the next one after February 9, 1920. Next came those of July 12, 1920, October 7, 1920, November 15, 1920, December 2, 1920, December 15, 1920, December 20, 1920, March 6, 1921. Reis said that Mayer did not say, in so many words, that he knew that the business was being conducted for his account or that he approved of Karl Mayer's signing the balance

sheets. It is evident that Richard Mayer did not approve. The letter of November 15, 1920 (Ex. B–R. 95) shows clearly that Mayer regarded the American business as his own and that he had no marks in Germany. He was sending them from America. The letter of March 6, 1921 (Ex. C–R. 95) expressly says that the partnership came to an end April 6, 1917, that Karl Mayer should not have signed the balance sheets, and tells him not to sign any more. Reis says that Mayer never wrote "I consider myself a partner still." The general substance of the letters which he saw was that Mayer "would not decide what he was going to do before his suit was over, here." Of course, Karl Mayer had no authority to give any consent to anything on Richard Mayer's behalf. The Court has so held in *Mayer* v. *Garvan*. No consent of his was consent by Richard Mayer. No knowledge of his was knowledge of Richard Mayer. A letter has been offered (Ex. 3, R. 95) dated September 28, 1922, in which, in connection with some real estate transaction, Richard Mayer sends power of attorney to his brother Karl with the usual general ratification clause. It obviously has nothing to do with anything in the case at bar. It was sent after this suit was begun, and after Richard Mayer had filed his answer therein setting up the report which he had made to the Alien Property Custodian in June, 1922, and his contention that he had not been interested in the German assets since April 6, 1917, and that they had then become the assets of the German partners. He has never recognized the existence of an interest since (R. 94). It appears convincingly that there had been no communications between the brothers for some two or three years after the war began, and until after Richard Mayer, by suit begun April 7, 1919, had set up his claim that he was entitled to all the American assets and had no interest in the German assets, and had not had since April 6, 1917. It is most improbable that pending this important litigation, involving a large part of a million dollars, he would have taken a differ-

ent position in his correspondence,— particularly when there was no need of it. He has continuously persisted in the claim up to the present time. No letters have been shown or quoted or stated in substance, that indicate any such inconsistency. The letter of March 6, 1921 (Ex. C–R. 95) shows that he was making his position very clear to his brother and that he regarded his interest in the German assets as ended April 6, 1917. The evidence clearly establishes that Mayer did not consent or contract with his enemy former partners that they might conduct a going business in Germany for his account after April 6, 1917.

g. Mayer could not before July 2, 1921 legally consent or contract with his enemy former partners that they might conduct a going business in Germany for his account. This is settled.

Mayer v. *Garvan*, 270 Fed. 229—278 Fed. 227.
Juragua Iron Co. v. *United States*, 212 U. S. 297, 306.
Hall's International Law, 6th ed., 494, 497.
Whiting's War Powers under the Constitution, 43d ed., 340, 342.
The William Bagaley, 5 Wall. 377, 408.
Planters Bank v. *St. John*, 19 Fed. Cases No. 11208.
Griswold v. *Waddington*, 15 Johns. 57, 16 Johns. 438, 447.
The Friendschaft, 4 Wheat. 105.
The San Jose Indiano, 21 Fed. Cases No. 12322.
The Cheshire, 3 Wall. 231.
The Anglo-Mexican, 118 L.T. n.s. 260, Privy Council.

h. The American assets had been liquidated in 1917. If the American assets had not been liquidated by Mayer's taking them to himself, and so becoming liable as a purchaser of them before the Alien Property Custodian took possession, they have not been liquidated yet, and he is not required to pay over any surplus until he has liquidated them and has satisfied his lien. In fact, they had been liquidated on April 6, 1917 (Mayer's Ans., Ex. A, R. 29). $170,954.56

was actual cash requiring no liquidation. $305,692.41 had been cash which Mayer had invested for himself in readily-marketable securities in his own name and for his own account — principally with Lee, Higginson & Company. The securities had declined slightly in value. He is charged with the amount which he had withdrawn to himself to invest in them. All but $35,000 par value of these securities had been sold again by Mayer before the seizure by the Alien Property Custodian in 1918. This appears by comparing the schedule of property taken by the Custodian (R. 30) with Lee, Higginson & Company's list of securities on hand April 6, 1917 (Ex. 10, R. 95). In this way, in 1917, Mayer either had in cash or had received in cash for securities sold, over $440,000. He had transferred into his own name the stock of the Richard Mayer Company — worth April 6, 1917, according to the balance sheet of that company, $429,-661 (R. 31). It should be noted that $100,000 of this balance was cash due to that company from the Export Department (R. 29), and so was already included in the cash item above stated. The only thing of moment requiring liquidation in this company was the merchandise. By the time of its seizure at the end of May, 1918, this item had been reduced from $209,691 to $42,609. (Ex. J, Ex. M–R. 96). In the light of the claim which Mayer made in 1918 to all the property seized by the Alien Property Custodian, he should be charged, in the accounting, with dollars as the value of the capital stock of the Richard Mayer Company and this asset, accordingly, should be treated as having been liquidated before May 28, 1918. If this is not so, it has not been liquidated yet. These shares of the Richard Mayer Company are still unsold, in Mayer's hands. Mayer cannot be required in this suit to turn over a surplus to the Alien Property Custodian until there has been a liquidation of the shares and a satisfaction of his lien. They should be treated as liquidated, by Mayer's purchase of them at their value when he took them to himself.

i. The continuation of the German business for six years after April 6, 1917 by the Reises and by Strauss, rendered them liable for the value of the German assets on April 6, 1917 irrespective of their intentions as to Mayer. When a partnership is dissolved, each of the partners has the right to have the partners in possession of the assets liquidate them immediately, and the consequent right, if liquidation does not take place within a reasonable time, to charge the partners in default with the value of the assets. In the case of the death of a partner, if the surviving partners continue the business of their own motion instead of liquidating within a reasonable time, they become liable for the value of the deceased's share at dissolution, notwithstanding the fact that they may have acted in good faith with the intention of conducting the business for the benefit of the late partner as well as for themselves. In *Clay* v. *Field*, 138 U. S. 464, the surviving partner continued the business in good faith in the interests of all concerned. The Court held (473) that: " The general principle of law undoubtedly is, that on the dissolution of the firm by the death of one of the partners, it is the survivor's duty to settle up the partnership affairs within a reasonable time, and pay over to the representatives of the deceased partner the amount due to them; and if he takes the responsibility of continuing the business of the firm, and using the property of the partnership, he becomes liable for losses that may occur, and it is in the option of the representatives of the deceased partner either to insist upon a division of the profits, which may be made in thus carrying on the business, or upon being paid the amount of the deceased's share in the capital, with lawful interest thereon, after deducting his indebtedness to the firm. (See Lindley on Part., Book III, chap. 10, pages 976 to 1046, 1047, 4th ed.). The application of the rule in this case would, strictly speaking, entitle the representatives of D. I. Field [the deceased partner] to call for an account of his share in the capital of the concern **at the time of his**

death, with lawful interest." (Italics not in original.) In the particular case, the rule was relaxed with respect to slaves liberated by the Emancipation Act, but it was not as to the other assets. In *Hutchins* v. *Page*, 204 Mass. 284, after dissolution the defendant partner continued to use the assets of the business. It was held that he was liable for their fair market value as a going concern at dissolution, including the value of the good-will, **notwithstanding the fact that the other partner had acquiesced.** The Court said (290): "An appropriation and use of the good-will and assets by one partner, with the acquiescence of the other, creates the same liability to account for them and their value as a wrongful appropriation of them. **It is equivalent to a purchase."** (Italics not in original). In *Moore* v. *Rawson*, 185 Mass. 264, it was held that where the defendants had continued to use the partnership assets without the consent of the plaintiff partner after dissolution, they were required to pay, in money, the amount of the value of his share of the assets, including good-will at the date of dissolution, together with a return proportionate to that amount for the use thereafter. The value should be determined on the date of dissolution, April 6, 1917 (*Parker* v. *Broadbent*, 134 Pa. St. 322; *Lindley on Part.*, 8th ed., p. 601). The representative of a deceased partner has the positive right to have the assets sold by the surviving partner (*Freeman* v. *Freeman*, 136 Mass. 260.). If this right is ignored by the partner in possession, he is to be held liable for the value of the assets at the date of dissolution. In *Hugh Stevenson & Sons, Ltd.* v. *Aktien-Gesellschaft*, 1918 Appeal Cases, 239; 118 L.T.N.S. 126 in the House of Lords; 115 L.T.N.S. 594 (1917), 1 K.B. 842 in the Court of Appeals; 114 L.T. 180 (1916) — a case apparently relied upon by counsel for the plaintiff and for the German partners, it was held that the partner in possession of partnership assets at dissolution by war, who continued to use the partnership assets instead of liquidating them, was liable not only for

the value of the other partner's share at the outbreak of war, but also for a return thereon measured by an interest rate. Here is an application of the general rule to the case of a dissolution by war. Hugh Stevenson & Sons, Ltd. brought this suit in the King's Bench against their German partner for a declaration of rights pending the war. The partnership business was in England. The plaintiff had continued the business. Atkin, J., held the partnership was dissolved by the declaration of war, and that the plaintiff had the right to carry on the business and that the enemy's right was to have the enemy's interest valued as of the date of the declaration of war and that amount paid, when payment is legally possible, without interest or profits, after dissolution. In the Court of Appeals, Swinfen Eady, L. J., held that: "In the absence of a special agreement to the contrary, the general rule is that on the dissolution of a partnership all the property belonging to the partnership shall be converted into money by a sale, even although a sale may not be necessary for the payment of debts; (Lindley on Partnership, 8th edit., p. 623)." . . . . . "Under the circumstances before mentioned, probably a claim for interest would be the real and effective claim in the present case, and not profits." Bankes, L. J., was in accord. A. T. Lawrence, J., dissented, and approved the judgment of Atkin, J. He said: "The partnership is dissolved because it is illegal. A King's court cannot foster, assist, or connive at the continuance of an illegal relation. It cannot, in my opinion, give an alien enemy profits which accrue after the relation has become illegal." The House of Lords affirmed the judgment of the Court of Appeals. Lord Chancellor Finlay said: "The German partner is, of course, not entitled to any share of the profits attributable to the skill or industry of the English partner, but some portion of the profits may be attributable to the machinery used, and the enemy partner would be entitled to some allowance in respect of his interest therein. Or, to put the matter in another way, some

allowance may be made in lieu of interest on its value in respect of the use by the English partner of the German share in the machinery." "*Hoare* v. *Allen* (2 Dall. 102) and *Brown* v. *Hiatts* (15 Wall. 177) seem to me not to be in conformity with English law." It is to be noted that this decision does not deal with the right of the absent partner [Mayer] to elect to hold the partners [Reises and Strauss] in possession liable for the value of the property at the time of dissolution if they do not sell it but on the contrary use it. It deals only with the obligation of the partners in possession to pay for the use of the property after dissolution if the absent partner does not elect to treat them as purchasers of it, because of their continued use of it and failure to liquidate. As far as the decision has any bearing on the effect of the action of the German partners in continuing the business, it is not unfavorable to Mayer. There is nothing in it inconsistent with the statement above quoted from *Clay* v. *Field* that if the surviving partner in possession takes the responsibility of continuing the business and using the property after dissolution, it is in the option of the other to insist on being paid the amount of his share at the date of dissolution, April 6, 1917, with interest.

j. This liability arose in 1917. There is no other date which can be taken. If the assets were not then liquidated by converting them into an obligation from the German partners to Mayer for credit against his obligation to the German partners, then the assets have not been liquidated yet, and Mayer has not had his interest in those assets satisfied. If he continued after 1917 to own a share in the German assets of the partnership, including the real estate and plants, he owns that share to-day,— not a money credit in accounting, but physical property,— quick assets, merchandise, machinery and real estate. By the terms of Section 8 (a) of the Trading with the Enemy Act, and by the terms of Section 10 of the decree of May 4, 1922, in *Mayer* v. *Garvan*, Mayer

is entitled to hold all the assets until his share in the German assets has been satisfied. He is not required to take his chances of getting his share out of Germany. He is not obliged to pay over any surplus to the Alien Property Custodian until that share has been actually satisfied.

9. The Courts below rightly defined in English the German word mark used in a United States Court. (A. P. C. assignments 1-3, 6, R. 157; Reis assignments 1-4, R. 159-161)

In both Courts below the plaintiff contended, and by his assignments of error apparently now contends, that in determining the value of the respective interests of the partners in the assets of the partnership, dissolved by the outbreak of war on April 6, 1917, those assets, so far as they were in Germany, should be converted into terms of the paper mark as it was valued for foreign exchange purposes on April 6, 1917, and then, at the mark estimate, should be converted into a dollar estimate at the value of the paper mark in foreign commercial exchange at the date of the decree. This astounding contention was made in 1923. When the trial opened, the foreign exchange value of the paper mark was .000048 dollars. This contrivance made Mayer's $574,775.26, as found by the Court, worth under $875. How it should be worked out now that the old mark has disappeared, cannot be predicted.

This case involves no question of foreign exchange. It involves no question of the date at which such foreign exchange shall be reckoned. Upon the outbreak of war April 6, 1917, there was no longer any rate of exchange. The internal value of the German mark in Germany on April 6, 1917, does not appear. It does not appear that the decline in the rate of foreign exchange before the war correctly expressed the decline in value in Germany (R. 151). The German partners were under no obligation to make a remittance to Mayer from Germany at any time after April 5, 1917. Mayer was under no obligation after that date to make any remittance to Germany. His obligation if any was to turn over dollars in the United States to the Alien Property Custodian of the United States. There was no occasion to find out what it would have cost in the United

States at any time to buy marks in Germany, or what it would have cost in Germany to buy dollars in the United States.

The assets in Germany had to be valued. They were not marks. They were lands, buildings, plants, machinery, furniture, fixtures, tools, utensils, merchandise, receivables, bank balances in Switzerland, and cash. It was necessary to state the value of these.

This value might have been stated in the English language, in the French language, in the Italian language, or in any other language. In fact, it was stated in a United States Court for April 6, 1917, in the word marks. This made it necessary to define the word used, when used in that Court. The word was in the dictionaries of the United States.

The Century Dictionary definition of a mark is, " the monetary unit of the German Empire equivalent to 23.8 United States cents."

The Director of the United States Mint, as required by law before and during 1917 and continuously thereafter at least as late as 1921, has determined the value of the German mark to be 23.82 cents.

This definition of 23.82 or 4.20 to a dollar, had been so continuously used between the partners that Strauss testified that it was the rate laid down in the partnership agreement (Garvan R. 101) and Mayer told Laible the same thing (R. 91) and was surprised to find otherwise when he saw the articles of co-partnership. Reis says " that was the usual way " (R. 89).

Mayer had contributed dollars (R. 80) to the capital of the firm, but in order to get it on the German books Reis translated it at 4.20.

There is no evidence that the dictionary definition, or that by the Director of the Mint, is erroneous. The finding of the Courts below, that in the United States the German

word " mark " is to be translated as .2382 cents was warranted by the evidence and not contrary to any evidence in the case (R. 73).

It is apparent from the evidence as a whole from Germany, that the values on the books in marks were the result of entries many of them made long prior to April 6, 1917. If on that date a German mark was not worth in Germany as much as 23.82 cents of the United States was worth in Germany, a thing which is entirely improbable on the evidence, then it is apparent that as the value of the mark had receded the stated value of the assets on the books was deficient, because, of course, as the value of the marks receded the value of the assets stated in terms of marks increased. Therefore, if on April 6, 1917 " mark " had come to mean something less than 23.82 cents in Germany, the German book figures should be correspondingly increased.

It is common knowledge that there is a fluctuation in foreign exchange, affected by questions of credit and by the demand and supply caused by relative volume of trade. These things have nothing to do with the intrinsic relation between the respective **internal** values of the two monetary units compared.

If the valuers in this case had been told to state these internal values in Germany April 6, 1917 in terms of the standard German coin, they would have stated no different figures. There was but one mark in Germany (R. 86). That was the expression used. There is nothing to indicate that the internal confidence in the German government on April 6, 1917 was not such that all marks were circulating at par. There is nothing to indicate that if the valuers had stated the value of the German assets in Germany on April 6, 1917 in dollars, they would not have stated for Mayer's interest, $574,775.26. On the other hand, if the value of those assets which were stated in terms of the standard German mark at 2,414,056.12, had been stated on April 6, 1917 in terms of the printing press product which the plaintiff

sought to have used in the accounting in March, 1923, those same assets would have been valued on April 6, 1917 at 9,052,710,450 marks. There is no basis for valuing a credit on April 6, 1917 by a measure which did not exist at that time. There is nothing in the case to show how much should be added to this figure for the profits which the German defendants have made out of the business since April 6, 1917 if the accounting were to be made as of the date of the decree in 1926.

It has been argued for the plaintiff that Mayer seeks to keep the solid American assets and to leave to the Germans the vanished German assets. This argument leaves out of sight, entirely, the fact that it is not shown what the German assets on the later date were. The assets in the new business after April 6, 1917 may have been turned and turned many times and into properties that have enhanced greatly in value. The German partners may stand as great gainers if they receive nothing from America.

It has been urged for the plaintiff and for the German defendants, that this case involves a conflict between what is termed the " Breach Day Rule " and the " Judgment Day Rule." It is submitted that it does not, because this is not a case to ascertain the amount of damages for a breach or to obtain a judgment in dollars on a contract to make payment in marks. The question here involved is the amount of the surplus if any for which Mayer, on April 6, 1917, was accountable in America in American dollars to be handed over in America to the Alien Property Custodian of the United States. That liability is not to be determined in marks, and then converted on a Breach Day or on a Judgment Day into dollars. The cases on this subject have been dealt with sufficiently in the Courts below (R. 152, 153, 72).

April 6, 1917 is the proper date.

Hicks, Alien Property Custodian v. *Guinness*, (Nov. 16, 1925) 46 Sup. Ct. Rep. 46.

The case is covered precisely by decision of this Court. There is no evidence in this case that the German mark was depreciated internally on April 6, 1917 (R. 151). In *Birge-Forbes Co.* v. *Heye*, 251 U. S. 317, 325—248 Fed. 636, 640 (C. C. A. 5th), the Court held that " the evidence failing to disclose any depreciation of the German mark at the time of this payment, the assumption should be that the value of the mark was at that time the normal value, and the judgment should be predicated upon this value." This was approved by the Supreme Court in the same case in 251 U. S. 317, 325.

Warranted by the evidence before them, the Courts below have found as a fact that Mayer's interest in the German assets at the dissolution of the partnership by the outbreak of war April 6, 1917, was $574,775.26. There is no ground for disturbing this finding. The Courts below rightly defined in English the German word mark used in a United States Court.

CONCLUSION

The Alien Property Custodian had no right to a dollar of the American assets. He had a right to have Mayer account, in view of all the German and American assets, April 6, 1917, for any surplus left in his hands. Mayer then had in this partnership a value of $745,083.39. He had in his own hands in the United States, enough to cover this. He was entitled to take his share of this money out at once and to put it to use to get the value of the use in addition. He was not obliged to put it away and to wait until the end of the war. If there was any surplus he was not obliged to send it to Germany. There was an Alien Property Custodian here to take it. Mayer was a citizen of the United States. He ought to come out at the end of this litigation with as much money as he would have had if the Alien Property Custodian of the United States, in the interest of his enemy partners and as trustee for them, had not wrongfully taken his property from him.

The law as to enemy trade and custody of alien property has been enacted and developed for the benefit of the Nation. For this purpose it may be necessary at times to impair the peace-time private rights of subjects of the enemy, and even of loyal citizens. The rights of loyal citizens, particularly, should be impaired as little as possible consistently with the welfare of the Nation. Such citizens as partners of enemy subjects should have their rights preserved. If the Nation itself, through its Alien Property Custodian, steps in, the necessary encroachment ought to come on the interests of the enemy subjects before those of the loyal citizens are touched.

Mayer — loyal, and free of wrong — ought to come out whole.

Respectfully submitted,

EDWARD F. McCLENNEN,

For the defendant Richard Mayer.

March, 1926.

TABLE OF CASES

Page

Agency of Canadian Car & Foundry Co. *v.* American Can Co., 258 Fed. 363 (C. C. A. 2nd) 20

Bender *v.* King, 111 Fed. 60, 67 (C. C. Mont.) 29

Birge-Forbes Co. *v.* Heye, 251 U. S. 317, 325 — 248 Fed. 636, 640 56

Bishop *v.* Pendley, 138 Ga. 738 — 76 S. C. 63 ..... 29, 32

Brown *v.* Hiatts, 15 Wall. 177 ..... 20, 50

Caldwell *v.* Leiber, 7 Paige 483, 507 ..... 29, 31

Clay *v.* Field, 138 U. S. 464 ..... 20, 47, 50

Foote *v.* Cotting, 195 Mass. 55, 63, dictum 29

Freeman *v.* Freeman, 136 Mass. 260 48

Goldthwait *v.* Day, 149 Mass. 185, 188 ..... 29, 31

Griswold *v.* Waddington, 15 Johns. 57 — 16 Johns. 438 at 447 45

Hall's International Law, 6th ed., 494, 497 45

Hicks, A. P. C. *v.* Guinness, Nov. 16, 1925 — 46 Sup. Ct. Rep., p. 46 ..... 19, 20, 21, 55

Hoare *v.* Allen, 2 Dall. 102 ..... 20, 50

Homestead Co. *v.* Valley R. R., 17 Wall. 153, 166 29

Hutchins *v.* Page, 204 Mass. 284 ..... 20, 48

In re Krupp, [1916] 2 Chancery 194 — 114 L.T.N.S. 1026 21

Irvine *v.* Angus, 93 Fed. 629, 633 (C. C. A. 9th), dictum Reversing 84 Fed. 127, 130 (C. C. Cal.) 29

Juragua Iron Co. *v.* United States, 212 U. S. 297, 306 . 45

Keener Quasi Con., p. 388 29

Lindley on Partnership, 8th ed., p. 601, 623 48

Litchfield *v.* County of Webster, 101 U. S. 773, 778, dictum 29

Looney *v.* Gillenwaters, 11 Heiskell (Tenn.) 133, 136. 29, 31

Mayer *v.* Garvan, 270 Fed. 229 (Garvan Record, p. 177) Mayer *v.* Garvan, 278 Fed. 27. Cases cited therein, and in brief for Mayer in that case in C. C. A., pp. 15 to 19 ..... 9, 18, 24, 25, 33, 45, 50

TABLE OF CASES—*Continued*

Page

Miller *v.* Humphrey, 7 Fed. (2) 330 (C. C. A. 9th Cert. Nov. 1925) 21
Miller, A. P. C. *v.* Robertson, 266 U. S. 243, 258 ... 19, 21
Montgomery *v.* United States, 15 Wall. 395 33
Moore *v.* Rawson, 185 Mass. 264 48
Myers *v.* International Trust Co., 263 U. S. 64 42
Nims *v.* Nims, 23 Fla. 69 ..... 29, 32
Oklahoma *v.* Texas, 256 U. S. 70, 85 42
O'Lone *v.* O'Lone, 2 Grant Chancery, Upper Canada, 125 ..... 29, 31
Parker *v.* Broadbent, 134 Pa. St. 322 48
Payne *v.* Martin, 39 Colo. 265 — 89 Pac. 46 ..... 29, 32
Planters Bank *v.* St. John, 19 Fed. Cases No. 11208 ... 45
Reid *v.* McQuesten, 61 N. H. 421 ..... 29, 31
Shearman *v.* Cameron, 76 N. J. Eq. 426 — 74 Atl. 979 29, 31
Sherman *v.* Savery, 2 Fed. 505, 516 (D. C. Iowa), dictum 29
Smith *v.* Newhouse, (Mo.) 199 S. W. 938, 942 ..... 29, 32
Standard Silver Lead Mining Co. *v.* Garvan, No. 3345 D. C. E. D. Washington 20
Stevenson (Hugh), & Sons, Ltd., *v.* Aktien-Gesellschaft, 1918 Appeal Cases, 239; 118 L.T.N.S. 126 in the House of Lords; 115 L.T.N.S. 594, [1917] 1 K. B. 842 in the Court of Appeals; 114 L. T. 180 (1916) 20, 48
The Anglo-Mexican, 118 L.T.N.S. 260, Privy Council 45
The Cheshire, 3 Wall. 231 45
The Friendschaft, 4 Wheat. 105 45
The San Jose Indiano, 21 Fed. Cases No. 12322 45
The William Bagaley, 5 Wall. 377, 408 45
United States *v.* Bayard, 127 U. S. 251 21
United States *v.* Moser, 266 U. S. 236 42
Whiting's War Powers under the Constitution, 43d ed., 340, 342 45